NO. 79-6423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBY GAIL LASSITER,

Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the North Carolina Court of Appeals

BRIEF FOR THE STATE OF NORTH CAROLINA, *AMICUS CURIAE*, JOINED BY THE ATTORNEYS GENERAL OF DELAWARE AND MISSISSIPPI, AND THE STATES OF FLORIDA, NEVADA AND ARKANSAS, *AMICI CURIAE*

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QUESTIONS PRESENTED BY *AMICUS CURIAE*

I. Does the Due Process Clause of the Fourteenth Amendment require that indigent parents be afforded appointed counsel in cases brought by a state or its subdivision seeking to terminate parental rights, and if so, must counsel be appointed for indigent parents in every such case?

II. Should a right to appointed counsel for indigent parents in termination of parental rights actions prosecuted by a state or its subdivision be given retrospective application?

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INTEREST OF AMICUS CURIAE

At issue is the constitutionality of North Carolina's Termination of Parental Rights Law, N.C.G.S. 7A-289.22, *et. seq.* (1979 Cum. Supp.) North Carolina's Attorney General, counsel for *amicus curiae*, is charged by law to defend the constitutionality of State statutes. 28 U.S.C. §2403(b); N.C.G.S. 114-2(1). The Attorney General is satisfied that the termination law is constitutional, notwithstanding that it does not provide for appointment of counsel for indigent parents whose parental rights are challenged, and *amicus* believes the statute is sound. Therefore, *amicus* wishes to join in this case. Further, *amicus* believes that the rejection of its position will have the following harmful effects. First, it will be necessary once again to terminate the parental rights of the Petitioner, Abby Gail Lassiter, which would delay, perhaps for another two years, the prospect of adoption for Petitioner's child, William. Second, an adverse decision will imply that a general right to appointed counsel for indigents exists in all important civil matters. Third, and most

important, an adverse decision might be given retrospective effect thereby upsetting numerous existing terminations and adoptions.

SUMMARY OF THE ARGUMENT

As a matter of Due Process under the Fourteenth Amendment, the right to appointed counsel for indigents only exists in cases where the indigent's personal physical freedom—his "absolute liberty"—is at issue. Thus, there is a right to appointed counsel in criminal cases, juvenile delinquency cases, and, often, involuntary commitment cases for the mentally ill, but not in other cases.

The important right to family integrity is meaningfully less important than the right to absolute personal liberty. Further, while the core of the parent-child relationship is a bundle of privacy rights, such as, for example, the right to instill one's own religious faith in one's child, other aspects of the parent-child relationship are traditionally and undeniably public concerns. Parents have duties to children, among them the duties to provide for their health and well-being, the proper performance of which is as necessary to "ordered liberty" in a democracy as are the private rights referred to above.

The parents' interest in family integrity is balanced by the State's compelling interest in protecting children. Moreover, the child has interests in his safety and in a correct and speedy determination of a termination of parental rights case, and these interests weigh on the side of the State, because the State is committed by law and tradition to act in what it believes to be the best interest of the child. While the State may be mistaken in a particular case, it is very unlikely that the State will proceed against a parent in bad faith. However, the same cannot be said of parents, who have both reasons and the ability to resist the termination action for unworthy motives.

North Carolina law provides safeguards to ensure accurate fact-finding at termination of parental rights hearings. Counties can only bring termination actions on certain narrow grounds. N.C.G.S. 7A-289.32 (1979 Cum. Supp).

Counties do not institute termination proceedings (except in cases of neglect by abandonment) without first attempting to solve the family problem which might constitute grounds for termination. The grounds for termination are not too complicated for parents to understand, and even parents who would have difficulty understanding the meaning of the various grounds can reach that understanding during the time the county department of social services works with them to solve their problems. Furthermore, the issues in termination cases are largely problems in social work practice, and, as such, they may be entrusted to a significant degree to professional social workers. Under these circumstances, appointed counsel do not meaningfully improve the fact-finding process.

With respect to the termination proceedings themselves, the State enhances due process by requiring that findings of fact be made on the basis of clear, cogent and convincing evidence[1] and by providing a guardian *ad litem* for the child in cases where the parent answers.

Given the balance of State and private interests and the significant steps taken to protect the fact-finding process, any burden on the State which follows from the appointment of counsel for indigent parents is constitutionally significant. Since the cost of parents' counsel will be real and the parents' attorney may be a source of delay, appointed counsel for parents are not required.

If this Court requires appointed counsel in termination of parental rights cases, the Court must hold that the need for counsel should be determined on a case-by-case basis. If the Court holds that indigent parents are entitled to appointed counsel in termination cases, *amicus* respectfully urges the Court that the decision should be narrowly drawn, so as not to imply a right to counsel in other important areas of civil law.

Equally important is the need for exclusively prospective application of any new rule. No child who has been freed for adoption, and certainly no child who has been adopted,

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[1]This quantum of proof was adopted in 1979 subsequent to the trial of the present case. N.C.G.S. 7A-289.30(e) (1979 Cum. Supp.).

should be forced to face the fear which would accompany any attempt to overturn an existing termination for the reason that the indigent parent involved was not represented by court appointed counsel.

ARGUMENT

1. AN INDIGENT'S CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL, ARISING UNDER THE DUE PROCESS CLAUSE, IS LIMITED TO CASES OF PERSONAL FREEDOM; THEREFORE, THE RIGHT DOES NOT PERTAIN TO CIVIL ACTIONS BROUGHT TO TERMINATE PARENTAL RIGHTS.

Due process joins order to liberty, and the two are symbiotically intertwined. The present case arises out of a very important aspect of liberty, the parent-child relationship. It lies on the cusp between the private aspects of the family relationship, which are so important to liberty, and the public aspect, which must be watched and protected in the interest of order, generally, and the child's welfare, in particular.

It is too simple to say that the parent-child relationship is fundamental to "ordered liberty" and, therefore, must be protected by appointed counsel. What is fundamental is that the child must have a safe home where he or she is cared for, adequately educated and inculated with the necessary values and principles underlying our society. While it is recognized that the family is almost always best able to pass down our "most cherished values, moral and cultural", *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 504 (1977), it is the end, not the means, which is fundamental to ordered liberty. When—albeit rarely—a family cannot or will not rear its children according to minimum civilized standards, the State is compelled to rescue the child.

Only a part of the parent's liberty is involved in a termination of parental rights action. Thus, a termination case differs from other decisions in this Court which recognize a right to appointed counsel where absolute personal freedom is involved. Further, when parental conduct moves away from the private core of the parent-child relationship and begins to touch the State's duty to protect the child, such conduct deserves somewhat less constitutional protection than conduct which is wholly private. Traditionally public aspects of the parent-child relationship may be touched by the State for reasons and in ways which could not constitutionally justify State interference in the private core of family life. After all, "due process is flexible and calls for such procedural protection as the particular situation demands." *Morrisey v. Brewer,* 408 U.S. 471, 481 (1972).

A. Personal Freedom Underlies All Civil or Criminal Cases Which Recognize a Due Process Right to Appointed Counsel.

The right to appointed counsel for indigent defendants began as a constitutional rule of criminal law, *Powell v. Alabama,* 287 U.S. 45 (1932), and it has never pulled loose from its moorings. Nor should it, for criminal punishment involves both an infringement of personal liberty and a stigma which are above all others. Further, criminal process—if abused—quickly and deeply undermines democratic freedom. It is, therefore, easy to understand why the right to be represented by counsel at a criminal trial is among the fundamental rights expressly recognized in the Sixth Amendment, while the common law right to retain counsel in civil matters is not similarly affirmed.

There can be no doubt that the special nature of criminal prosecutions is the principal reason for appointed counsel in criminal cases.[2] In *Powell v. Alabama, supra,* the Court held

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[2]Criminal trials are unique. "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin v. Illinois,* 351 U.S. 12, 17 (1956) (Fourteenth Amendment requires free transcripts for appellate review of criminal convictions).

that the right to appointed counsel in an unusual capital case was among the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." 287 U.S. at 67. Four years later, in *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936), the "fundamental right of the accused to the aid of counsel in criminal prosecutions" was reiterated. When the right to appointed counsel was extended to the states, Mr. Justice Black wrote:

> The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.
>
> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)

More recently, *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), held that no person may be imprisoned for any offense without having been represented by counsel at trial. Viewing *Powell* and *Gideon* in retrospect, this Court summed them up, saying as follows:

> [T]heir rationale has relevance to *any criminal trial* where an accused is deprived of his liberty. *Powell* and *Gideon* suggest that *there are certain fundamental rights applicable to all. . . criminal prosecutions, even those. . . where the penalty is 60 days imprisonment.*
>
> *Id.* at 32 (emphasis added).

Plainly, in light of *Argersinger*, imprisonment for a crime is the cornerstone supporting the right to appointed counsel. *Accord, Scott v. Illinois*, 440 U.S. 367 (1979).

Moving away from criminal prosecutions, the right to appointed counsel becomes less absolute. At parole and probation revocations, the right to counsel is not absolute even though the revocation would deprive the defendant of his personal freedom. This Court reasoned that the defendant had already lost his "absolute liberty" by virtue of

his conviction and that what remained was "conditional liberty." *Gagnon v. Scarpelli,* 411 U.S. 778, 781 (1973); *Morrissey v. Brewer,* 408 U.S. 471, 480 (1972). Because something less than the defendant's entire "bundle" of liberties was at risk, an absolute right to appointed counsel did not exist.

The analysis of appointed counsel in the civil context is even more complicated.

> Civil lawsuits. . . are not like government prosecutions for crime.... [T]he government is not usually involved as a party,[3] and there is no deprivation of life, liberty or property as punishment for crime. Our Federal Constitution, therefore, does not place such private disputes on the same high level as it places criminal trials and punishment. There is consequently no necessity, no reason, why government should in civil trials be hampered or handicapped by the strict due process rules the Constitution has provided to protect people charged with crime.
>
> *Boddie v. Connecticut,*
> 401 U.S. 371, 391 (1971)
> (Black, J., dissenting).

Because of this constitutional difference between criminal and civil cases, the right to appointed counsel has only been extended to civil cases insofar as they resemble criminal cases and carry both a real threat of incarceration and, in lieu of punishment, a meaningful stigma.

In *In re Gault,* 387 U.S. 1 (1967), this Court held that a juvenile respondent had a right to appointed counsel at a delinquency hearing where he was threatened with the prospect of commitment to training school. *Id.* at 554. Time

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[3]In the present case, the Durham County government is plainly a party, but only as a friend of the child, who would have no protection without the county's assistance. The county is like the other private persons who have standing to bring petitions to terminate parental rights. See, N.C.G.S. 7A-289.24 (1979 Cum. Supp.).

and again in *Gault*, this Court emphasized the similarity between delinquency proceedings and criminal trials, between juvenile commitment and adult incarceration. *Id.* at 533, 538, 546, 547, & 551. Plainly, the close similarity between criminal court and juvenile court was necessary to the conclusion that counsel must be appointed.

Involuntary commitment of the mentally ill also involves deprivation of absolute liberty and stigma[4] in lieu of punishment.[5] Therefore, for many purposes these hearings partake of the nature of criminal trials.[6] Analysis is complicated somewhat by the fact that the leading cases[7] involve the mental health treatment of criminal prisoners, but for the purpose of this brief, *amicus* may say without harm to its argument that a right to appointed counsel probably attaches to involuntary commitment hearings,[8] because it is plain from the cases in this Court that the right is incident to a massive loss of personal liberty. *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (plurality opinion) ("mandatory behavior modification"); *Specht v. Patterson*, 386 U.S. 605, 607 (1967) (sex offender found to be mentally ill "becomes punishable for an indeterminate term").

Except in the cases above, there is no right to appointed counsel for indigents. It is not even always available in the criminal context. *Gagnon v. Scarpelli, supra,* (counsel at parole or probation revocation depends on case-by-case analysis). The prospect of summary criminal punishment in cases of direct criminal contempt does not require

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[4]*Vitak v. Jones*, 445 U.S. 480, 494 (1980).

[5]The prospect of punishment is not altogether absent. If one committed for mental health treatment receives none, the hospital may be transformed into a penitentiary. *Rouse* v. *Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966).

[6]However, proof beyond a reasonable doubt is not necessary to an involuntary commitment. *Addington* v. *Texas*, 441 U.S. 418, 431 (1979). And a juvenile may be placed in a mental hospital with limited procedural formality, provided his parents concur. *Parham v. J.R.*, 442 U.S. 84, 606-613 (1979).

[7]*Vitek* v. *Jones, supra*, n.4; *Jackson* v. *Indiana*, 406 U.S. 715 (1972); *Specht* v. *Patterson*, 386 U.S. 605 (1967).

[8]*Heryford* v. *Parker*, 396 F.2d 393, (10th Cir. 1968) (likelihood of involuntary loss of liberty is "of utmost importance").

appointment of counsel. *See, Brown v. United States,* 359 U.S. 41, 51 (1959). While there is a split of authority, the prospect of incarceration for civil contempt is more often held not to require appointment of counsel for the alleged contemnor, except in complicated cases. *Jolly v. Wright,* 300 N.C. 83, 94, 265 S.E.2d 135 (1980); *Sword v. Sword,* 399 Mich. 367, 381, 249 N.W.2d 88 (1976); *Duval v. Duval,* 114 N.H. 422, 425-26, 322 A.2d 1 (1974). *Contra, Tetro v. Tetro,* 86 Wash.2d 252, 255, 544 P.2d. 17 (1975) (incarceration *sine qua non*); *Otton v. Zaborac,* 525 P.2d 537 (Alaska 1974) (incarceration *sine qua non*). Claims of a right to appointed counsel have been rejected by courts in the domestic context, *Kiddie* v. *Kiddie,* 563 P.2d 139, 143, 85 A.L.R. 3d 977 (Okla. 1977); *In re Smiley,* 36 N.Y.2d 433, 433, 369 N.Y.S.2d 87, 330 N.E.2d 53 (1975); *Parsley v. Knuckles,* 346 S.W.2d 1,3 (Ky. 1961) (dicta), and in other civil contexts. *United States v. Cohen,* 530 F.2d 43, 48 (5th Cir. 1976) (psychiatric exam ordered by court); *United States v. Sturgis,* 342 F.2d 328, 332 (3rd Cir. 1965) (draft board hearing).

Finally, this Court previously faced the present question in *Kaufman* v. *Carter,* 402 U.S. 954 (1971) (op. of Black, J., diss. from den. of cert.). The Court, of course, denied certiorari, thereby allowing to stand a California decision[9] denying appointed counsel, which was decided on the express ground that a termination case was a civil case to which no right to counsel attached. In dissent, Mr. Justice Black took the position that termination cases were substantially like criminal cases. *Amicus* respectfully disagrees with Justice Black's opinion, but *amicus* accepts his mode of analysis. It is, in fact, the difference between criminal trials and termination proceedings which eliminates the constitutional need for appointed counsel at the latter.

B. The Right to Family Integrity, Which Is Part of a Larger Right to Privacy, Is Important, But It Is Meaningfully Less Important Than Personal Freedom.

The preceding section demonstrates that the right to

[9] *Robinson* v. *California,* 8 C.A.3d 783, 87 Cal. Rptr. 678 (1970). *See, In re Cager,* 251 Md. 473, 485, 243 A.2d 384 (1967) (no right to counsel in neglect/custody case).

appointed counsel depends not merely upon a deprivation of some liberty or upon punishment, but rather upon the loss of absolute personal freedom. Petitioner seeks to raise herself to the level of these cases by establishing the constitutionally "fundamental" nature of her right to custody of William. In so doing, she relies on several decisions of this Court, which, in the opinion of *amicus*, are distinguishable in that they do not involve parents and children,[10] lie at the private core of the parent-child relationship,[11] or involve First Amendment rights in addition to the right to custody of children.[12] Those cases which are most closely on point stop short of saying all aspects of the parent-child relationship are "fundamental"[13] and indicate that the strength of a parent's right may vary according to parental conduct.[14]

The best statement of the right to family integrity appears in *Stanley v. Illinois*, 405 U.S. 645 (1972). The case holds that the natural father of illegitimate children, whom he had raised, was entitled to notice and an opportunity to be heard before the children could be made wards of the State. This Court condemned Illinois' "procedure by preseumption," *id.* at 656-657, which denied Stanley any procedural rights because his children were illegimate.[15]

In *Stanley*, this Court "emphasized the importance of the family." *Id.* at 651. In so saying, the Court relied on a number of substantive due process cases involving either mixed questions of family relationships and First Amendment rights or matters of sexual privacy. While certain of these

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[10]*Smith v. Organization of Foster Families*, 431 U.S. 817 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also, cases cited in *Stanley v. Illinois*, 405 U.S. 645, 561 (1972).

[11]*Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[12]*Yoder v. Wisconsin, supra; Pierce v. Society of Sisters, supra.*

[13]*Stanley v. Illinois, supra*, n. 11, at 651 (1972).

[14]*Caban v. Mohammed*, 441 U.S. 389, 392 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

[15]*Stanley* is similar to *Boddie v. Connecticut*, 401 U.S. 371 (1971) in that the Illinois presumption of unfitness entirely foreclosed Stanley's opportunity to get into court to litigate custody of his children.

underlying cases speak of the "fundamental" nature of the family, which cannot be infringed except for compelling reasons, *Stanley* stops short of this in applying procedural due process to a question of parental fitness and child custody. *Stanley* says that the "private interest" of a man in the children he has sired *and raised* warrants deference and protection "absent a powerful countervailing interest." *Id.* at 651. *Accord, Quillion v. Walcott*, 434 U.S. 246, 248 (1978). However, *Stanley* also recognizes that "neglectful parents may be separated from their children," *id.* at 652, because the State has a powerful interest in doing so. *Stanley* only demands that neglectful parents be given notice and a fair hearing. In short, though *Stanley* says a great deal, it says somewhat less than Petitioner supposes. After its discussion of the importance of familial rights, *Stanley* only imposes the ordinary standard of procedural due process.

Following *Stanley*, this Court held in *Quilloin* v. *Walcott*, *supra*, that a father of illigitimate children who had not raised or legitimated his children could lose his children through adoption without his consent upon a showing that this was in their best interest and without a showing that he was unfit. *Id.* at 255. *Quillion* means that substantive family rights depend, in part, on parental conduct.[16] Not only are a parent's rights in his children less than fundamental when the parent's harmful conduct is a traditionally fit subject of public scruntiny, but they can atrophy.[17]

The foregoing cases mean that the parent-child relationship—important as it is—is not so fundamental that it naturally requires the extraordinary due process protection of court-appointed counsel in order to be fundamentally fair. Therefore, those lower court decisions in termination or neglect proceedings which hold, without more subtle analysis, that counsel must be appointed to protect the

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[16]"Parental rights do not spring full blown from the biological connection between parents and children. They require relationships more enduring." *Caban v. Mohammed, supra*, n.14, at 397 (Stewart, J. dissenting).

[17]*Compare, Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), which holds that foster parents can, over time, acquire an interest in their foster children which deserves rudimentary due process protection.

parents' fundamental interest in their children are mistaken.[18]

C. The Balance of Relevant Factors Indicates that the State Need Not Appoint Counsel for Indigent Parents In Termination of Parental Rights Cases.

The triparte test for calculating the amount or quality of procedural process which is due appears in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

The *Mathews* test shows that the State is not obligated to provide appointed counsel to indigent parents in termination of parental rights cases.

[18] *Smith v. Edmisten*, 431 F.Supp. 941 (W.D. Tenn. 1977); *State ex rel Heller v. Miller*, 61 Ohio St.2d 6, 399 N.E.2d 66, 67 (1980); *In re Brehm*, 3 Kan.App.2d 325, 594 P.2d 269 (1979); *Matter of Chad S.*, 580 P.2d 983, 985 (Okla. 1978) (dicta); *Reist v. Bay County Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (1976); *In re Myricks*, 85 Wash.2d 252, 533 P.2d 341 (1975); *Crist v. Division of Youth and Family Services*, 128 N.J.Super. 402, 320 A.2d 203, 210 (1974); *In re Welfare of Luscier*, 89 Wash.2d 135, 524 P.2d 906 (1974); *In re Adoption of R.I.*, 455 Pa. 29, 312 A.2d 601 (1973); *In re Friesz*, 190 Neb. 347, 208 N.W.2d 259 (1973); *In re Ella B.*, 30 NY.2d 352, 285 N.E.2d 288 (1972); *State v. Jamison*, 241 Or.144, 444 P.2d 15 (1968)(dicta)

Other cases relied upon by Petitioner are distinguishable because they rely on an underlying statute. *Matter of Chad S., supra; In re Simeth*, 40 Cal.App.3d 982, 115 Cal Rptr. 617 (1974); *Chambers v. District Court*, 261 Iowa 31, 152 N.W. 2d 816 (1967) (dicta). Others involve child neglect custody cases where, as is explained *infra* at 16, n. 40, the relationships between parties are more complex and separate counsel for all parties are more important. *Davis v. Page*, 618 F.2d 374 (5th Cir. 1980); *Smith v. Edmisten, supra*. Others involve continued representation on appeal. *In re Brehm, supra; Reist v. Bay County Circuit Judge, supra.*

1. The Private Interests Affected.

Amicus has already weighed the parent's interest in family integrity. That interest is less weighty than personal freedom, and it is not fundamental when questions of public concern, such as minimally adequate care, are involved. Therefore, that interest alone does not compel the State to appoint counsel for indigent parents.

Applying the *Mathews* analysis to this case, the child's interest must be included in the calculation with the parent or against him, as is appropriate. Ordinarily, the child's interest coincides with his parents'. *See, Parham v. J.R.*, 442 U.S. 584 (1979). But, termination cases are not ordinary, and, as these cases involve the child's privacy, the State and the child may combine their interests against those of the parents. *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

In general terms, grounds for termination at the time in question were parental failure to establish or maintain concern or responsibility for the child, abuse, neglect, illegitimacy coupled with gross paternal disinterest, nonsupport for six months while the child is in institutional custody, or failure for two years to make "substantial progress" or a "positive response" toward correcting the conditions that led to placing the child in foster care.[19] Termination cases normally cannot be brought until the child has been in county custody and care for at least six months.[20] Thus, termination cases cannot be brought except where there is well established reason to believe that grounds exists and that the child's best interests are served. This being so,

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[19]N.C.G.S. 7A-289.32. (1977 Cum.Supp.)

[20]While abuse, neglect or lack of parental concern or responsibility can constitute immediate grounds for termination, in practice misconduct serious enough to justify termination triggers a child custody action under the separate procedures of N.C.G.S. 7A-516, *et seq.* (1979 Cum.Supp)[former N.C.G.S. 7A-277, *et seq.* (1977 Cum.Supp.)] Once the child is in custody, social services proceeds deliberately, first to restore the family, and only if this is impossible, to develop a sound case for termination.

the child's own privacy interests weigh with the State, and less process is due to the parent.

2. The Risk of Error and Usefulness of Appointed Counsel.

Lawyers are ill-suited to argue against their own usefulness in any judicial proceeding. At the same time usefulness obviously has not been the test for appointment of counsel; had it been, attorneys would be appointed in all matters. They are not, because the courts have indicated that the nature of the forum,[21] importance of the interest involved,[22] and presence of alternative safeguards,[23] are also important parts of the procedural due process calculation.

Looking at termination proceedings, we see that, while they are judicial and not informal, they are also based on fairly simple grounds. Almost always, the case involves a child who has been in social services custody for some time and parents who have been receiving social services. The parents have had the opportunity to learn over time what acts, omissions or conditions must be changed before the county department can safely return their children. In practice, then, social workers give meaning to the statutory grounds for termination of parental rights, and parents have reason to understand what is in issue.[24]

Petitioner's case illustrates this. Her parental rights were terminated because she wilfully left her child in foster care for two years without showing a positive response to Social Services efforts to strengthen her relationship with William or to plan for his future.[25] Joint Appendix at 7. It is clear from the transcript and the Joint Appendix that Petitioner knew, or should have known, why her parental rights were in

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[21]*Goldberg v. Kelly*, 397 U.S. 254 (1970); *Parham v. J.R., supra.*

[22]*Goldberg v. Kelly, supra; Argersinger v. Hamlin, supra; Gagnon v. Scarpelli, supra.*

[23]*Parham v. J.R., supra; Gagnon v. Scarpelli, supra*

[24]When we are dealing with due process rights other than in criminal trial context, it is a "sufficient answer" to the objection that a "hidden" defense may be lost for want of a lawyer to say that it is *not* a criminal case. *Gagnon v. Scarpelli*, 411 U.S. at 789.

[25]The ground relied upon is found at N.C.G.S. 7A-289.32(3) (1979 Cum.Supp.) Petitioner has *never* challenged this conclusion.

jeopardy. She had left her then eight-month old child, William, malnourished, infected, and untreated by doctors.[26] Her own mother filed a neglect complaint against petitioner[27] and several times told county social workers she could not raise William[28]. After Petitioner's son entered foster care, she saw him once at the behest of social services[29] and twice more by chance meeting on the street.[30] She never took any interest in him while he had been in foster care,[31] and although she was contacted in prison by social services, she never initiated any contact with the department.[32]

Significantly, Petitioner understood the purpose of the hearing[33] and attempted to rebut this evidence. She denied medically neglecting her son, and said she carried him to the doctors for treatment.[34] She and her mother denied that her mother filed the neglect petition.[35] She testified that her efforts to see her son were thwarted by social services' inattention.[36] She cross-examined the social services' witness concerning the witness' opinion that termination was in the child's best interest,[37] and she offered her countervailing theory that children naturally know and belong with their family.[38] In short, Petitioner presented the evidence she needed, either on her own or in response to pertinent questions by Respondent's counsel, but was not believed.

Her present objection that the case against her was proved, in part, by unauthenticated business records[39] forgets that the judge was able to discount the hearsay if he found it less credible than the live testimony, and assumes that the

[26]Transcript at 11.
[27]Transcript at 17.
[28]Transcript at 14.
[29]Transcript at 12; Joint Appendix at 6.
[30]Transcript at 12; Joint Appendix at 6.
[31]Transcript at 22.
[32]Transcript at 15-16; Joint Appendix at 6-7.
[33]Transcript at 20.
[34]Transcript at 25.
[35]Transcript at 30, 48 & 49.
[36]Transcript at 38 & 52.
[37]Transcript at 20 & 22.
[38]Transcript at 40.
[39]The hearsay is, of course, competent, since there was no objection.

evidence could not have been authenticated and admitted over objection. She also ignores the significant evidence adduced from the orders in the earlier neglect hearing.[40] Finally, the trial judge showed no bias against the Petitioner;[41] the court's concern with precise questions was meant to keep the Petitioner on track[42] not to lead or impeach her.

This Court has recognized that fact-finding in special cases can be fairly protected by means other than full-blown judicial process. *Parham v. J.R., supra.* North Carolina provides such safeguards in termination cases. Foremost is good social work practice. North Carolina law prevents termination except when the "parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.[43] North Carolina leads the trend in social work

[40]*Amicus* wants the Court to be aware of the fact that since this case was tried, North Carolina has added a provision to its Juvenile Code, N.C.G.S. 7A-516, *et seq.*, (1979 Cum.Supp.) which provides appointed counsel for all parents in abuse, neglect and dependency cases. N.C.G.S. 7A-587. Thus, parents are represented at the threshold litigation concerning child custody. See, N.C.G.S. 7A-289.32(2), (3) & (4) (1979 Cum.Supp.).

Petitioner cites this change in law as ironic, but *amicus* urges the Court to recognize that counsel for both parents and child [N.C.G.S. 7A-586] is more important during abuse or neglect cases where, under the present system, the county department of social services has statutory obligations both to the child and the parent. N.C.G.S. 7A-516(3) & N.C.G.S. 7A-646 (1979 Cum.Supp.) When the county's interests are divided, both parent and child deserve independent protection. In termination cases, however, the county's attentions are not divided. It stands as a friend of the child, and the parent stands apart.

[41]The judge summed up his role, saying, "I want to give you a fair try (sic)." Transcript at 24.

[42]See, Transcript at 52.

[43]N.C.G.S. 7A-289.22(1)(1979 Cum. Supp.). State policy is in accord. "When the relationships essential to the child's well-being and self-worth are threatened or destroyed, first and continuing efforts should be directed toward increasing or restoring family unity. When such efforts fail and removal of a child from his family becomes mandatory, careful attention should be paid to selecting the type of care away from his family. . . In order to permit a child's early return to his family, it is necessary to try to increase the strengths of his family. Permanent separation of a child from his family should be determined as quickly and soundly as possible." I *Family Services Manual*, c. IV, 1200 (Rev. 75).

practice toward *very selective* but *prompt* use of termination as a means of providing children with good permanent homes.[44]

Turning to other precedural protections, North Carolina takes a most important step toward protecting the child's interest in all cases wherein the parent files an answer by appointing an attorney as guardian *ad litem* to represent the child. N.C.G.S. 7A-289.29(b) (1979 Cum. Supp.). If an independent, legally-trained participant is needed (in

[44]In a one-year pilot program involving eight counties, each county assigned a reduced case load of 16 children to selected social workers. A total of 370 children were involved, and 238 children returned home. Another 59 were adopted. The remaining 73 were in long-term foster care, pre-adoptive placement or likely soon to go home. The money savings prompted four of the eight counties to hire additional social workers to expand the program, and other counties are following suit. *North Carolina Department of Human Resources, Division of Social Services. Permanent Homes for North Carolina's Children: A Report on Permanency Planning in an Eight County Project* (1980).

The North Carolina Department of Human Resources, Division of Social Services, maintains unpublished records showing the means by which adopted children were made legally free for adoption:

YEAR	All Final Public Agency Adoptions	Public Agency Adoptions Based on Termination
1977	431	102
1978	479	125
1979	398	188

These same records show the elapsed time between termination and adoption:

	Time in Months Between Termination and Adoption			
YEAR	0-6	7-12	13-18	19 & Over
1977	60	11	3	28
1978	65	23	10	27
1979	119	26	9	34

(The number of terminations shown here is lower than the number of terminations shown at p. 18 because (1) these figures do not include 1980, (2) these figures only show final adoption orders which usually are not entered for one year after the adoption proceeding is begun, and (3) not all terminations result in adoptions.)

addition to the judge) the guardian *ad litem* serves that end.

The Court must recognize the special ethical obligations of government attorneys to seek justice, avoid unfair litigation and treat all ligitants so as to avoid harm.[45] Here, frankly reality reinforces ethics, because in local government legal practice small staffs and high case loads combine to preclude unmerited litigation.

Finally, *amicus* asks the Court to note that termination hearings are recorded in every instance, N.C.G.S. 7A-289.30(a) (1979 Cum. Supp.), and this is an important safeguard against error or caprice. The State also asks the Court to note that, subsequent to the trial of the present case, North Carolina raised the quantum of proof in termination actions to clear, cogent and convincing evidence. N.C.G.S. 7A-289.30(e) (1979 Cum. Supp.)

In light of these procedures and because appointed counsel for parents would not bring any special knowledge of social work, psychology or family therapy to a termination proceeding, *amicus* insists that appointed counsel would not be a significant addition to the factfinding process.

Practice in North Carolina seems to bear this out. A survey of North Carolina county departments of social services conducted in preparation for this argument[46] indicates that terminations cases are (1) always warranted and (2) not significantly affected by the presence of counsel for the parents. Of the 100 countries, 73 responded, including the eight largest.

In the responding counties, 768 termination of parental rights cases were brought between October, 1977 and December, 1980. Parental rights were terminated 760 times and not terminated eight times. In 127 of the cases, parents were represented by counsel. Of these 127, parental rights were terminated 120 times and not terminated seven times. One parent successfully defended his parental rights himself.

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[45]Code of Professional Responsibility of the North Carolina State Bar, Ethical Consideration EC7-9, EC7-10, EC7-11, EC7-13, EC7-14.

[46]Survey data appears in Appendix C. of Respondent's Brief. *Amicus* is aware of the potential weaknesses in research of this sort, and offers it only in the absence of any published or regularly compiled data.

Looking at the seven cases where parents with counsel prevailed, in five of them the court concluded that grounds for termination existed but that termination would not be in the child's best interest.

In evaluating these figures it is good to remember that the large majority of these cases were uncontested by the parents. Although the exact figures are not known, it is likely that the number of contested cases where parents were without counsel does not much exceed the number of cases where parents retained counsel.

Amicus finds the following implications in these figures. First, social workers do not bring unfounded petitions to terminate parental rights. Only .3% of the cases were without grounds. This indicates that extra-judicial safeguards in North Carolina work. Second, the presence of counsel does not significantly affect the outcome, and insofar as it does, the presence of counsel correlates with a finding that termination, though authorized, is not in the child's interest. This correlation might be the result of a bias in favor of affluent parents, who can afford counsel, or a bias in favor of interested parents, who will take the added step of retaining counsel. It is not necessarily a testament to the effectiveness of counsel.

3. The Burdens on State Function and Resources.

The third part of the *Mathews* analysis requires a calculation of the effect on the State. Given that the State is cloaked with the child's interest and that the fact-finding process is inherently accurate, any burden on the State tips the scales decisively in its favor.

As *amicus* understands this third part of the *Mathews* test, the effect on State function is something different than the effect on the State's resources. The State's exclusive function in termination cases is the protection of the child. This is not a quasi-criminal proceeding to vindicate society's rights. This is a pure *parens patriae* proceeding wherein the State is protecting the physical well-being of a child.[47] In fulfilling

[47]See, *In re Gault*, 387 U.S. at 16.

this role, the State is not very different from private child-placing agencies, parents and foster parents who may also file termination cases. But if the State must provide appointed counsel, then its function is subtly changed. The State is made to appear to be acting in a quasi-criminal fashion, acting to punish not to protect.

The State's function will be affected in a second way if it must appoint counsel in these plainly civil cases, which do not involve personal freedom. The State is involved in much civil litigation against persons, who may be indigent, involving important liberty and property interests.[48] If the existing threshold between those cases which involve absolute liberty and those which do not is crossed, then, as Mr. Justice Douglas said in a related context. "I do not see the length of the road we must follow."[49] Given the (properly) inexorable progress of the appointed counsel rule in criminal cases, the State's traditional position as an ordinary civil litigant will be deeply undermined if Petitioner prevails here. No matter how this Court emphasizes the special importance of the parent's liberty interest, the challenge will begin.[50]

Turning to the probable burden on State resources, the State's cost of supplying attorneys for indigent parents in termination cases alone will be significant. In North Carolina, judges set the fees for court appointed counsel, and, of course, there is no precedent by which we can judge the cost to the State. But given approximately 250 terminations a year,

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[48]Among these are actions in tort, to collect debts, to condemn property, to foreclose tax liens, to revoke licenses, and others. Plainly, these can affect a person's home or means of livelihood. Some involve the possibility of criminal liability. Their importance should not be gainsaid.

[49]*Boddie* v. *Connecticut*, U.S. at 385 (Douglas, J. concurring). *See, also, State ex rel. Heller* v. *Miller, supra at* 15 (Holmes, J. dissenting) ("Where will the right to appointed counsel. . . at state expense end?").

[50]The challenge has begun. In the wake of *Boddie* v. *Connecticut, supra*, two courts have faced the question of appointed counsel in domestic cases. *Kiddie v. Kiddie, supra; In re Smiley, supra.*

At this time in North Carolina, a case is pending which asks the State to appoint counsel for respondents in paternity/child support actions. *Wake County ex rel. Carrington v. Townes*, No. 8010 DC 1024 (North Carolina Court of Appeals, filed Oct. 24, 1980).

fees of only a few hundred dollars per case would total over $100,000. This is not *de minimus,* and there must be added to it the additional administrative costs.

D. Appointed Counsel Would Not be Needed in Every Termination of Parental Rights Case.

In response to the suggestion that appointed counsel are always needed at parole and probation revocations, this Court said:

> While such a rule has the appeal of simplicity, it would impose direct costs and serious collateral disadvantages without regard to the need or likelihood in a particular case for a constructive contribution by counsel.
>
> *Gagnon v. Scarpelli,*
> 411 U.S. at 787

Gangnon analyzed at least seven factors in weighing the need for counsel: the purpose of the proceeding, its form and formality, the interests served, the safeguards present, the cost to the State, the existence of a "timely and colorable" defense, and the fundamental fairness of the procedures. We consider these factors *seriatim.*

First, as discussed above, termination actions are meant to protect children, not punish parents. They arise after efforts to restore the family have failed and, in this respect, are analogous to *Gagnon,* where it is said that parole revocation is a failure of rehabilitative efforts. *Id.* at 785. This Court concluded in *Gagnon* that parole officers have professional reasons to avoid unmerited revocations, and the same is true of terminations, as is evinced by the North Carolina statistics explained above.

Second, while termination actions are more formal than parole revocations, it should be remembered that they usually arise, as this one did, after the children have been removed from the home, and parents have had the opportunity to learn what is the matter. The procedure in

termination cases does not include the technicalities which are present in criminal law, such as, for example, sufficiency of a warrant, questions of double jeopardy, or motions to suppress evidence. This reduces the need for counsel. *See, id.* at 789. While it is true that an unrepresented parent will not know the rules of evidence, he is singularly able to speak to the facts which allegedly constitute grounds for termination, and he does not have the added problem of speaking to a jury. Nor is the hearing entirely formal. The judge has considerable discretion at the disposition stage, N.C.G.S. 7A-289.31 (1979 Cum. Supp.), in determining whether the termination would be in the child's best interests, irrespective of the fact that grounds exist. It is significant that the data shows that parents (even represented by counsel) are more likely to prevail on this discretionary ground than they are to rebut the county's formal proof that grounds for termination do exist.

The third, forth and fifth factors are analyzed above, and need not be repeated. The question of a timely and colorable defense is, however, a new matter. As to timeliness, it should be noted as evidence of a need for a timeliness requirement, that Petitioner utterly failed to answer the termination petition filed against her. Her presence at the hearing was entirely due to counsel for the Respondent. If this factor is to be given weight, it would seem that, at a minimum, no right to counsel attaches to a parent who neither answers nor voluntarily appears at the hearing.

As to a colorable defense, Petitioner had one, her claim that social services was not helpful. However, in many circumstances, it is hard to conceive of a reasonable defense or extenuating circumstances. Thus, if a child is neglected because abandoned, N.C.G.S. 7A-289.32(2) (1979 Cum.Supp); N.C.G.S. 7A-517(21) (1979 Cum.Supp.), it is hard to imagine a colorable defense. The same is true of an illegitimate child who, though known to his father, has never been legitimated or supported, N.C.G.S. 7A-289.32(6) (1979 Cum. Supp.), and of children left in foster care without being given reasonable support. N.C.G.S. 7A-289.32(4) (1979 Cum. Supp.). Finally, the Court must be aware of the fact that very many terminations are uncontested.

As *Gagnon* recognizes, the final test of due process is "fundamental fairness." *Id.* at 790. Given the balance of interests among the child, its parents and the State, given that termination is not desired except where rehabilitative efforts have failed, and given the real financial and administrative costs to the State, it is not unfair at all to require that a parent answer the petition as a prerequisite to appointed counsel. It is not unfair to demand that the parent suggest a substantial defense to the action, something more than Petitioner's mistaken claim that children naturally know and love their families or her frivolous claim that she had seen her son on the street in addition to her only visit at the department of social services. Actually, it is not fundamentally unfair to proceed without appointed counsel at all.

II. A Right To Appointed Counsel For Indigent Parents in Termination Of Parental Rights Cases Must Be Given Wholly Prospective Effect.

Amicus is keenly aware that decisions by this Court involving important personal rights are frequently given retrospective application. Of course, this is not always so. *Eg., Linkletter v. Walker,* 381 U.S. 618 (1965). In its decisions dealing with non-retroactivity, the Court has considered three separate factors.

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precent upon which litigants may have relied [citation omitted], or by deciding an issue of first impression whose resolution was will further or retard its purpose [citation omitted]. Second, it has been stressed that "we must... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its purpose [citation omitted]. Finally, we have weighed the inequity imposed by a retroactive application, for "... there is ample basis in our cases for avoiding 'injustice or hardship'

> by a holding of nonretroactivity." [Citation omitted.]
>
> *Chevron Oil Co.* v. *Huson,*
> 404 U.S. 97, 106-107 (1971)

The third factor, "hardship", alone precludes retrospective application of any decision adverse to Respondent and *amicus,* whether the decision calls for an absolute right to counsel or one to be accorded on a case-by-case basis. Retroactive application would threaten several hundred adoptions in North Carolina, and thousands nationally. In addition it would threaten even more completed terminations where the child is in a pre-adoptive placement or in well-settled long-term foster care. The mere knowledge that a retrospective result was possible would make adopted children and their new parents anxious. Certainly, these people had no reason to suspect that an adoption or termination would be vulnerable to a collateral attack. To the contrary, the adoption statute indicates that final adoptions are nearly impregnable, N.C.G.S. 48-28 (1976), and children, parents and agencies alike will have relied on this. In light of this, retrospective application would contradict the Court's often expressed concern for the realities of child placement and its understanding that a child's real present attachments are worthy of great protection and deference. *Eg., Quilloin* v. *Walcott,* 434 U.S. at 244; *Smith* v. *Organization of Foster Families.* 431 U.S. at 844.

Turning to the other factors, we see that this is plainly a case of first impression and one not clearly foreshadowed by this Court. The contrary is the case, as is seen from the Court's emphasis on physical freedom as the touchstone of a right to appointed counsel, *Scott v. Illinois, supra; In re Gault, supra,* and its criminal, Sixth Amendment orgins, *Gideon v. Wainwright, supra; In re Gault, supra,* coupled with the Court's decision ten years ago not to hear the issue. *Kaufman v. Crater, supra.*

Finally, the history of the old rule, that counsel will not be appointed in civil cases, runs to time out of mind. To change that now, even in this single instance, is to rewrite history. On

the other hand, the purpose of the new rule, accurate fact-finding in a matter of great importance, will not be served because (1) the fact-finding is already inherently accurate and amply protected, and (2) the importance of relitigating a settled case and, just perhaps, returning a child to natural parents is out-weighed by the need not to sunder the child's new family.

This Court has indicated that prospective application is appropriate in similar circumstances. *Eg., Caban* v. *Mohammed,* 441 U.S. at 416 (Steven, J. dissenting); *Griffin v. Illinois,* 351 U.S. at 25 & 26 (Frankfurther, J. dissenting). So, too, have other courts. *Crist v. Department of Youth and Family Services,* 320 A.2d at 211. *Amicus* respectfully suggests that this case is one where, if the Court makes new law, that law should be explicitly prospective.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges the Court to affirm the decision of the North Carolina Court of Appeals and thereby reaffirm the traditional and well-reasoned rule denying appointed counsel in civil actions not involving personal freedom.

Respectfully submitted,

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